The Well-Bred Loaf, Inc. ***and*** **Bakery, Confectionery & Tobacco Workers International Union, Local 3, AFL–CIO** ***and*** **Matilde Morales.** Cases 2–CA–23722, 2–CA–23820, and 2–CA–23819

July 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On March 25, 1991, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Respondent each filed exceptions, supporting briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as amended[3] and to adopt the recommended Order.

[1] The Respondent, citing *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), contends that the allegations of 8(a)(1) and (3) violations based on the impressions of surveillance and the discharge warning to Bianchi should be dismissed because they are not closely related to any of the underlying charges filed in the instant case. The charges allege in substance that the Respondent unlawfully discriminated against four employees during a 4-month period both before and after a Board election. Although the Respondent raised this issue at the hearing, the judge failed to address it in his decision. We find that the allegations of the impressions of surveillance (which the judge dismissed) and the discharge warning to Bianchi are closely related to the charge allegations. In *Nickles*, the Board cited with approval *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973), in which the court stated that it would find a sufficient relation between the charge and the complaint in which all the allegations involved ''part of an overall plan to resist organization.'' *Nickles Bakery*, supra at 928 fn. 7. See also *Jennie-O Foods*, 301 NLRB 305 (1991). There is a sufficient nexus between the allegations in dispute and the charge allegations because they all occurred within the same general time period and concern conduct which constitutes an overall plan to resist the Union.

[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the the findings.

In adopting the judge's finding that the Respondent unlawfully discharged Matilde Morales, we note that Eluid Torres, who was treated more leniently than Morales under the Company's absentee policy, was the Company's observer in the August 1989 election.

[3] We shall conform the judge's Conclusion of Law 2 with his findings and recommended Order. Accordingly, we amend the conclusion to read ''By issuing a discharge warning to Bolivar Bianchi, the Respondent violated Sec. 8(a)(3) and (1) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Well-Bred Loaf, Inc., Congers, New York, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

Richard DeSteno, Esq. and *Randy Girer, Esq.*, for the General Counsel.

Robert Heiferman and *Chris Pinchiaroli, Esqs. (Jackson, Lewis, Schnitzler & Krupman)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on September 24–28, 1990. The charges and amended charges were filed respectively on July 7, August 25, September 11, and October 26, 1989. The consolidated complaint was issued on December 22, 1989, and was amended on August 2, 1990. In substance, the complaint as amended alleged as follows:

1. That in June, July, and August 1989 Respondent's supervisors engaged in surveillance of its employees' union activities.

2. That in July 1989 Supervisor Mark Sementilli issued a verbal warning to Bolivar Bianchi because of his union activities.

3. That on June 26, 1989, the Respondent discharged Juan Espinal because of his union activities.

4. That the Respondent, for discriminatory reasons, took the following actions against employee Matilde Morales.

(a) 1-day suspension on August 18, 1989.
(b) 3-day suspension on August 22, 1989.
(c) Discharge on August 30, 1989.

5. That the Respondent, for discriminatory reasons, suspended Maria Urena on August 21, and thereafter discharged her on August 29, 1989.

6. That the Respondent on August 30, 1989, suspended Grecia Santana because of her union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent concedes and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also concedes and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

This Company was the subject of a prior unfair labor practice proceeding which resulted in a Board decision in 1986 cited at 280 NLRB 306. Among other things, the Board concluded that the Respondent had unlawfully discharged six employees; had illegally interrogated employees; and had unlawfully threatened employees with discharge. The Board also concluded that such conduct warranted the granting of a bargaining order to the Union which had obtained authorization cards from a majority of the bargaining unit employees. The events in that case transpired in 1980 and although the supervision has changed since that time, the Company's ownership has remained the same.

In 1988 an election was held at the Company which was won by the Union but which was set aside based on the Employer's objections. When a second election was held in 1988, the Union lost.

On June 12, 1989, the Union filed a petition for an election in Case 2–RC–20731. Thereafter, pursuant to a stipulation for certification upon consent election approved on July 19, the Union won an election that was held on August 9, 1989. Consequently, the Union was certified as the bargaining representative of Respondent's production employees. It is agreed that although the parties have bargained they have not, as of the time of this hearing, consummated an agreement. (There is no allegation that the Respondent has bargaining in bad faith.)

B. *The Operative Facts*

1. The discharge of Juan Espinal

Espinal was employed by the Respondent in the shipping and receiving department from 1985 to June 26, 1989.

In 1989 Espinal received three warnings before his discharge. The first was issued on May 8 for being late six times since January 1, 1989. The second issued on May 18 and was for three additional latenesses since May 8. The third was issued on May 22 for refusing to work overtime. As the third warning was not relied on to justify his discharge, I shall consider only the first two.[1] In this respect the May 8 warning stated, inter alia:

> If Juan Espinal is late one more time, he may be terminated. He must be on time from now until December 31st, 1989.

The Union's organizing campaign resulting in the last election, began in May or June 1989. It appears that the most active employee in the campaign was Bolivar Bianchi who was assisted by, among others, Juan Espinal, Grecia Santana, Matilde Morales, and Maria Urena. It also appears that prior to the filing of the election petition, the union activities of Espinal and the others were carried out surreptitiously.[2]

Joy Selvaggi, the Company's personnel director, states that the petition was received by the Company on the afternoon of Friday June 16, 1989. She states that when it was received, Judy Glicken (one of the owners), said ''it looks like we're going to have another election.'' According to Selvaggi, she and Glicken returned to the plant to hold a manager's meeting about the petition.

According to Selvaggi, the Company's management held a supervisor's meeting regarding the Union the week after receipt of the petition (June 19 or 20). She states that the supervisors present were Jorge Grenada, Tommy Martinez, Arthur Kops, and Alfredo Perez. Selvaggi testified that they were told that a petition had been received, that an election would be held, and that the Company would begin a campaign. Selvaggi also states that that she believes that by this time an attorney had been called.

On Friday, June 23, 1989, Espinal and the other employees in his department were told by Supervisor Martinez that their hours for the summer were being changed and that their new starting time would be 9:30 a.m. instead of noon. On Monday June 26, Espinal forgot about the change and did not arrive at the plant until about 9:45 a.m. When Martinez asked why he was late, Espinal said that he had forgotten about the change of hours. On that same day, Henry Arias, another employee in the department, testified that he arrived about 5 minutes late and received no reprimand. (Under company guidelines, however, an arrival within 5 minutes of the starting time is not considered a lateness.)

Espinal's late arrival was reported by Martinez to Selvaggi who testified that she then made the decision to discharge him. She testified that this decision was based on the fact that Espinal was on final warning status and her assertion that the Company's policy automatically mandated discharge after 10 absence or lateness incidents in any given year. (In fact, Espinal's lateness on June 26 was his 11th for the year, whereas his 10th was on May 11, 1989.)

The General Counsel contends that the timing of Espinal's discharge (only 10 days after the Company's receipt of the election petition), is strongly suggestive of unlawful intent. Further, he would assert that even if it was not demonstrated that the Company was specifically aware of Espinal's current union activities, it would be reasonable to assume that Martinez, being aware of Espinal's past union activities, would have surmised that Espinal was active in the present union drive. The General Counsel therefore contends that given all these circumstances, including the circumstances of Espinal's lateness on June 26, that his discharges was disaproportionate to his offence and was therefore motivated by antiunion considerations.

The Respondent counters by arguing that Espinal had received two previous warnings in 1989 for latenesses and having exceeded the allotted number of such incidents, was discharged for cause on June 26 when he failed to arrive at work on time. What I find troubling about the Respondent's position is that it seems to argue too much and relies on an asserted policy which does not seem to have been followed in a uniform manner.

---

[1] The Company's policy is to wipe the slate clean at the start of each year insofar as latenesses and absences. Accordingly, any lateness or absentee warnings given to Espinal prior to 1989 would be totally irrelevant.

[2] Espinal testified that he also was active in the earlier 1988 election campaign and had signed a union leaflet at that time. Espinal testified that in 1988 his supervisor, Tommy Martinez, told him that he never imagined that Espinal would have signed the leaflet and asked why he did it. This evidence, however, does not prove that the Respondent was aware of Espinal's union activities immediately before the present petition was filed. Also, knowledge of Espinal's union activities is not shown by testimony that Supervisor Jorge Grenada spoke to Espinal about the union as that evidence did not indicate that such conversations occurred prior to the Company's receipt of the petition.

Selvaggi testified that the Company instituted a no-fault lateness policy in November 1988 which, unlike its past policy, had specific guidelines to match disciplinary actions to days late. Thus, Respondent offered into evidence a one-page document purporting to be its guidelines which read as follows:

> Subject: Lateness
>
> It is important that you be at your work station on time.
>
> A full-time employee is considered to have an unsatisfactory attendance record if such employee has been late more than 4 times in a calendar year. There is a 5 minute grace period allowed per lateness. Excessive latenesses will result in disciplinary action.
>
> The following guidelines should be used for disciplinary action:

Days Late	*Action*
4	Acceptable
5	Verbal Warning
8	Written Warning
10	Termination

> If the employee is on probation and is given a written warning, this will be grounds for termination.

The General Counsel offered into evidence an employee handbook which indicates that it became effective on March 17, 1989. This handbook obtained from the Employer pursuant to subpoena, applicable to the office and plant staff does not contain the above-noted guidelines. It states:

> Subject: Lateness
>
> It is important that you be at your work station on time.
>
> A full-time employee is considered to have an unsatisfactory attendance record if such employee has been late more than 4 times in a calendar year. There is a 5 minute grace period allowed per lateness. Excessive latenesses will result in disciplinary action.[3]

Consistent with the employee handbook, and inconsistent with the assertion that 10 latenesses will automatically result in termination, is the May 18 warning to Espinal which stated that any further latenesses may result in termination.

Moreover, contrary to the testimony of Selvaggi that termination will, under the Company's policy, automatically result in discharge, there is evidence that this is simply not correct. For one thing, Espinal himself was not discharged on his 10th but on his 11th lateness. Further, the evidence shows that employee Maria St Louis had 10 latenesses in 1989 and was not discharged even though she did receive a warning.

On the other hand, the Respondent produced evidence that three nonprobationary employees with excessive latenesses were discharged in 1989 albeit after the discharge of Espinal. The Abraham brothers were discharged in August 1989 and a Mr. Artz was discharged in December 1989. (I would be more persuaded had the Respondent shown that there were employees discharged for excessive lateness before the discharge of Espinal. Thus, it might be argued that after the Company became aware of the Union's organizing campaign, the Respondent decided to enforce its ''rules'' with more rigor.)

I think that the Employer has overstated (and thereby weakened), its case by asserting that it enforced an automatic rule which compelled Espinal's discharge. At the same time I cannot overlook the weaknesses of the General Counsel's prima facie case. Apart from the fact that Espinal signed a union card, there is no evidence to suggest that the Company was aware of his union activities during this organizing campaign. Further, there is no evidence of any contemporaneous 8(a)(1) conduct indicating antiunion animus. There is no dispute regarding the fact that on May 18, before the Union's organizational activities became known to the Employer, Espinal received his second warning for lateness with the admonition that he could be discharged if this infraction continued. The evidence shows that Espinal was in fact late on June 26, 1989, and there was evidence that other employees with one exception, have been discharged for excessive latenesses.

On balance (and precarious balance at that), it is my opinion that the Respondent has met its burden of demonstrating that it would have taken the action of discharging Espinal in the absence of his protected conduct. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

2. The surveillance allegations

The employee who began the present organizing campaign was Bolivar Bianchi. As a maintenance person, he worked in various parts of the plant and his job therefore carried him into the various departments of the Company.

According to Bianchi, beginning in June and July 1989, company supervisors began to appear in sections of the plant where he found himself working. Although, the General Counsel attributes this to unlawful surveillance, I find that Bianchi's testimony regarding this particular allegation to be too vague and subjective. Moreover, where else were the supervisors supposed to be, except in the departments where they worked and where Bianchi visited from time to time? *Honda of Mineola*, 218 NLRB 486 (1974).

The General Counsel also alleges that the Company engaged in surveillance of its employees' union activities by having its supervisors visit the company lunchroom more frequently during the preelection campaign period.

The evidence establishes that the Company has a lunchroom where employees and supervisors are permitted to eat. In the past, employees have been more likely than the supervisors to use this room. Nevertheless, testimony from the General Counsel's own witnesses revealed that at least one supervisor, Kops, ate there on a regular basis.

The General Counsel's witnesses testified that during the preelection period, various supervisors such as Tommy Martinez, Alfredo Perez, and Jorge Grenada began to eat at the lunchroom on a regular basis. They also testified that during these occasions, the supervisors would engage the employees in discussions about the Union. Such discussions were described by the Government's witnesses as open and candid.

[3] On the other hand, the guidelines for discipline appear in an ''Employee Handbook for Managers and Supervisors'' having an effective date of March 17, 1989.

There is no real dispute about the facts. The Respondent concedes that its supervisors did make an effort during the preelection period to talk to employees in the lunchroom about the upcoming election and tried to convince them that they should vote against the Union. No statements made during these meetings were alleged to have been coercive within the meaning of Section 8(a)(1) of the Act.

Based on the above, I conclude that the conduct of the supervisors cannot constitute unlawful surveillance as it is evident that their actions were not intended to discourage employees from engaging in union activities but rather to encourage employees to engage in open discussion with their supervisors about the issues surrounding the upcoming election. Further, as the employees may have chosen to talk about the Union within the Company's lunchroom where at least one supervisor has regularly eaten lunch, the Union cannot, in my opinion, complain that the Employer was spying on the employees' union activities. *Hoschton Garment Co.*, 279 NLRB 565 (1986).

3. Allegations involving Matilde Morales

Matilde Morales began her employment at the Respondent in July 1986 in the packing department. The supervisors of the packing department during the summer and fall of 1989 were Arthur Kops and Alfredo Perez. (The latter was called Freddie Perez by all concerned.)[4]

Morales became an active supporter of the Union during the previous 1988 election campaign. Additionally, in February 1989 she was subpoenaed by the Government to be a witness in the unfair labor practice case which settled. (She did not testify.)

In the most recent campaign, Morales signed a union card in April 1989, which was solicited by Bianchi. In May, she went on a 3-week vacation and took off a fourth week by purporting to use accumulated sick leave. In any event, Morales testified that when she returned to work in June 1989, she became very active in support of the Union and engaged in activities such as distributing union leaflets in the shop. Moreover, Morales testified that in June she told Foreman Perez that she supported the Union.

The Company does not deny that it had knowledge that Morales was a supporter of the Union. Indeed, it is acknowledged that when management held a series of meetings in July to talk to employees about the upcoming election, Morales as well as a few other employees, were excluded because it was felt that she would not be inclined to vote against the Union no matter what the Company said.

As noted above, the election which the Union won, was held on August 9, 1989. The alleged discriminatory actions against Morales occurred commencing on August 18, 1989. Thus, the General Counsel would argue that there is a nexus between these transactions and the fact that the Union had just been voted in by a majority of the work force.

In 1989, prior to her suspensions and discharge, Morales received two warnings for absenteeism. On May 4, 1989, she was given a warning for being absent nine times since January 1, 1989. Thereafter, on June 5, 1989, she received another warning which stated:

> You have previously received warnings for absenteeism and for not calling in appropriately. Your absence the week of May 30, 1989 has brought your total to 13 days absent, which is grounds for termination. You also failed to call in by 5/30/89. It also appears that you have used sick time to extend your vacation in violation of instructions and company policy.
>
> . . . .
>
> Further absences for any reason or attendance violations thru the end of the year will result in termination.

On Friday, August 18, 1989, Perez told four of the people in the packing department to put their hair inside their hairnets. Shortly thereafter, Perez returned and told Grecia Santana and Matilde Morales that Plant Manager Peter Testa wanted to see them because of their refusal to obey Perez regarding the hairnets. Morales contended that she was being picked on, began to cry, and went toward the bathroom. Morales states that on the way, she passed by Testa and put her gloves in a trash can. On the other hand, Testa testified that Morales threw the gloves at his feet and that she refused to pick them up when he asked her to do so. In this respect, Morales conceded on cross-examination, that the gloves fell on the floor, that she was asked by Testa to return to pick them up, and that she ignored him. Viewed in totality, the evidence shows that Morales did throw her gloves which landed near Testa's feet and did ignore his instruction to pick them up. Whatever Morales' intention, this event could reasonably be viewed by Testa as an act of defiance and insubordination. On the same day, Morales was given a 1-day suspension which was issued solely for her refusal to pick up the gloves as ordered by Testa. (Nothing in the suspension notice related to the earlier hairnet problem and it is noted that Grecia Santana, another union activist, did not receive any discipline in relation to that incident.)

According to Testa, he spoke to Judy Glicken later on August 18 about his suspension of Morales and was told that Morales was on final warning. (Since this warning was issued over the signature of Testa on June 9, one wonders why he needed to be reminded of it.) He states that he therefore reconsidered whether the 1-day suspension was sufficient and decided to give Morales an additional 3-day suspension starting on Tuesday. However, Joy Selvaggi, who was out on August 18, testified that it was she (not Testa), who made the decision to give Morales the additional 3-day suspension which was prompted in large measure by the fact that Morales was late three times in the period from July 12 to August 3.

Morales testified that on October 16, 1989, she was robbed on her way home and because of her emotional upset and in accordance with her doctor's orders, she took off on October 17 and 18. She states that when she returned to work on October 19, she gave a doctor's note to Perez.

[4] The Respondent concedes that Arthur Kops was a supervisor within the meaning of Sec. 2(11) of the Act, but it disputes the supervisory status of Perez. In this regard, Kops testified that he and Perez shared the responsibility of supervising the packing department with Perez in charge of about 12 people in the wrapping area. Other evidence showed that Perez, who was designated by the Company as a ''foreman,'' was responsible for making up the employees' work schedules and was responsible for making sure that employees performed their duties properly. Additionally, the record showed that Perez issued disciplinary warnings and attended regular supervisory meetings. Based on these factors, I conclude that Perez was a supervisor within the meaning of Sec. 2(11) of the Act.

On October 24, 1989, Morales was informed by Testa that she had been discharged. The termination notice indicates that the reason for her discharge was absenteeism and the Company acknowledges that the prior suspensions in August did not play any role in the decision to discharge her. The termination notice states in pertinent part:

> When employee came to work she was a very good worker, the only problems I had with employee was her absenteeism. (Signed by Perez.)

Joy Selvaggi, the personnel manager, testified that the Company had a no-fault absenteeism policy which entailed a series of predetermined and automatic disciplinary actions for any absences over 6 days per year except for those where an employee has been given, pursuant to prior request, a leave of absence or where an employee is on disability leave as defined by New York State law. According to Selvaggi, the policy in 1989 was that measuring from the beginning to the end of the year (January 1–December 31, 1989), nonprobationary plant workers could be absent 6 days which was deemed acceptable. She states that after 2 absences over 6 (except as defined above), would result in a verbal warning; that after 4 absences over 6 would result in a written warning; and that after 6 absences over 6 (or a total of 13), would result in automatic termination. Additionally, she testified that as employees were allowed in 1989 to carry over a maximum of 6 sick days if unused in 1988, it was theoretically possible for an employee in 1989 not to be discharged until having 19 absences if that employee had carried over 6 sick days from the prior year. If for example, an employee had carried over 4 sick days from the prior year, he or she would therefore could be absent 16 times before discharge. Additionally, and somewhat separate from the above rules, it is asserted that the Company maintained a policy that employees were required to call in when they were absent.

In support of Selvaggi's testimony regarding the Company's policy, the Respondent introduced into evidence a one-page document (R. Exh. 27). This document, which is dated March 17, 1989, states:

> After completing the first year of service, current employees will be paid for unused sick/personal days at the end of the calendar year.
>
> A full-time employee is considered to have an unsatisfactory attendance record is such employee has been absent more than his allowed time off per calendar year. Excessive absenteeism will result in disciplinary action.
>
> The following general guidelines should be used for disciplinary action:

Days Absent, Plant Staff	*Days Absent, Office Staff*	*Action to be Taken*
6 per year	9 per year	Acceptable
+2 over acceptable	+2 over acceptable	Verbal Warning
+4 over verbal	+4 over verbal	Written Warning
+6 over written	+6 over written	Termination

> Any employee absent from work must call in to their supervisor prior to the start of their shift everyday that they are absent and after 3 days of absence, they must bring a doctor's note or they will not be allowed to return to work. Failure to call in when an employee is absent can result in discharge.

There are, however, a number of problems regarding Selvaggi's testimony and the above-described document. First, when the Employee Handbook for Office and Plant Staff was turned over to the General Counsel pursuant to his subpoena, the contents of Respondent's Exhibit 27 was not there. Instead the comparable page in the employee handbook, which by the way is dated August 1, 1989, simply stated:

> After completing the first year of service, current employees will be paid for unused sick/personal days at the end of the calendar year.
>
> A full-time employee is considered to have an unsatisfactory attendance record is such employee has been absent more than his allowed time off per calendar year. Excessive absenteeism will result in disciplinary action.
>
> Any employee absent from work must call in to their supervisor prior to the start of their shift everyday that they are absent and after 3 days of absence, they must bring a doctor's note or they will not be allowed to return to work. Failure to call in when an employee is absent can result in discharge.[5]

Second, if 13 absences within a given year automatically will result in termination as testified to by Selvaggi, it is impossible to explain why Morales was not fired on June 5 when she received a warning for being absent 13 times since January 1, 1989.[6] Additionally, the record shows that an employee named Eliud Torres received warnings for absenteeism on May 5 and August 30, 1989, the latter for being absent 11 times since the start of the year. Thereafter, the weekly payroll report for the week ending September 23 shows that Torres was out 1-3/4 days during that week. Finally, on September 29, the Company issued a warning to Torres for being absent on September 25, 1989, which by my reckoning would be his 13th or 14th absence since January 1. Needless to say Torres was neither suspended nor discharged.

There also seems to be a discrepancy between Selvaggi's description of the policy and the purported terms of the policy itself as written. A literal reading of the policy would be as follows: Six absences a year would be acceptable; plus 2 over acceptable (or 6 + 2 = 8), would result in a verbal warning; plus 4 over a verbal (or 4 + 8 = 12), would result in a written warning; and plus 6 over a written warning (or 12 + 6 = 18), would result in termination. Under such a reading of the policy, even assuming it was in effect, this would

[5] It is noted that R. Exh. 27 is identical to p. 3-05 in the ''Employee Handbook for Managers and Supervisors'' (R. Exh. 52), which is dated March 17, 1989.

[6] In 1988, Morales received two warnings for absenteeism and one warning regarding the operation of a machine. These warnings, however, played no part in her discharge. At the end of each year, prior warnings for lateness or absenteeism are wiped out and the employee starts the new year with a clean slate.

place Morales at 15 absences and therefore not enough to warrant discharge.

Apart from the alleged discriminatees in the present case, the Respondent provided records of nine individuals who were discharged in 1989 for either absences or latenesses. Of these one (Judy Meyers), was in sales and therefore her situation is not relevant. Another (Ted Macintosh), was a probationary employee and therefore his situation is also irrelevant. Three others (Jim Artz, George Abraham, and James Abraham), were discharged for latenesses and two others (Rodriguez Ackerson and William Santana), were discharged for not calling in when absent. Of the remaining two (Nick Corraele and Patrick Nicholson), the records did not indicate how many absences they had accrued during 1989 and prior to their respective terminations. Thus, the Company has not demonstrated that Morales' discharge for absenteeism was consistent with the discharge of other employees with similar records.

Regarding the August 18, 1989 suspension, I am of the opinion that the Employer has shown that Testa had reason to believe that Morales was disregarding his authority, that discipline was justified, and that a 1-day suspension was appropriate to the offense. I therefore shall dismiss this particular allegation.

However, it is my opinion that the further 3-day suspension of Morales on August 22 was not motivated for cause but rather was motivated by union considerations. In this respect, I note that Morales was known by the Company to be an active union supporter and that this action took place soon after the Union won the election. Further, I note that the Company's witnesses gave conflicting versions of the reasons for this suspension with Testa and Selvaggi each claiming credit for the decision. I therefore shall conclude that this suspension was violative of Section 8(a)(1) and (3) of the Act.

With respect to the discharge, it is my opinion that the Company violated Section 8(a)(1) and (3) of the Act. Although the Company asserted that Morales' discharge was motivated solely by the automatic application of its absentee policy, I think that it has been shown that there were serious discrepancies regarding the existence of and/or uniform application of this policy. Given my conclusion that the General Counsel has made out a prima facie showing that Morales was discharged because of her union activities, it is my opinion that the Respondent has not met its burden as required in *Wright Line*, supra.

4. The discharge of Maria Urena

The complaint alleges that Maria Urena was discharged because of her union activities on August 29, 1989. The Respondent asserts that the reason she was discharged was because despite prior warnings, she refused to work required overtime.

Urena began her employment with the Company in September 1986 and worked in the packing department under the supervision of Alfredo Perez. She testified that she was an active union supporter and that she solicited other employees in the lunchroom during breaks and outside the plant. Although Urena attended some of the company campaign meetings she, like Morales was excluded from others. She credibly testified that Perez told her on one occasion that she was no longer invited to the meetings because the Company's owners said that she (Urena), was in favor of the Union. (This likely would have occurred in late July.)

The company policy regarding hours and overtime, effective January 1989 states:

> Due to our need to meet our customer's demands, overtime work maybe required from time to time. We appreciate and expect your cooperation.
>
> . . . .
>
> It is The Well-Bred Loaf's practice to have a forty to forty-five hour work week schedule but work hours may vary depending on t he season and the department.

In relation to overtime, the Company's witnesses testified that because the Company's product consists of foods without preservatives, it is imperative that what is produced daily be packed and put into the freezer by the end of the workday. Therefore, the people in the packing department do not work a 9 a.m. to 5 p.m. shift. Rather, they may be required to work until the work is completed.

On June 14, 1989, Urena received a warning from Peter Testa which indicated that it was for disobedience and for being uncooperative. The narrative portion of the warning stated:

> Employee was asked to clean the machines because it was her turn. She told her supervisor that she was not going to clean any machine, that she was going home, and she could do whatever he wanted to.
>
> . . . .
>
> Future actions of insubordination will lead to suspension or termination.[7]

On June 23, 1989, Urena received another warning for refusing to work overtime. The warning stated inter alia:

> This is a final written warning for not staying late to finish your work. If this action occurs again you will be terminated.

It is noted that the complaint does not allege that either of the warnings in June 1989 were discriminatorily motivated. I therefore assume that they were, from the Government's point of view, justified.[8]

According to Selvaggi, she met with Urena regarding the above-described warnings but was essentially told by Urena that she would do as she pleased.

According to Urena, in July 1989, she told Perez that she was having problems with babysitting and therefore could not always stay late. There is no indication, however, that Perez indicated that this was approved.[9]

Urena testified that on August 17, 1989 (Thursday), she told Perez at about 6 p.m. that she had to leave because she

---

[7] It is noted that this warning was given 1 or 2 days before the Company received the election petition.

[8] It was shown that the Company excluded from its campaign meetings those employees it knew were most active in favor of the Union. The fact that Urena was not excluded at the early meetings supports the proposition that the Company was not aware of the extent of her union support at the time these June warnings were given.

[9] At an unemployment hearing, Urena testified that in late July 1989, she told Perez that she would *never* stay to work overtime. This is, of course consistent with the testimony of Selvaggi that when she spoke with Urena about this problem, Urena responded that she would do as she pleased.

had no babysitter. She also states that he told her that this was not his problem and that if she left it would go on her record. Notwithstanding this notification, Urena left the plant with employee Grecia Santana before the work of their group had been finished.[10]

On Monday, August 21, 1989, Urena was suspended by Judy Glicken in the absence of Joy Selvaggi. At the time, Glicken told Urena that on Selvaggi's return she would determine Urena's fate. On August 29, Selvaggi, on her return, converted Urena's suspension to a discharge. Urena was advised of this decision by telephone.

There was testimony by Supervisor Arthur Kops that he will do the best he can to allow employees to leave without doing overtime if they have babysitting or other comparable problems. He states that either he or Perez will do this by shifting around employees to cover departmental needs. Indeed, Kops testified that in the past he has excused both Urena and Santana as well as other employees from working overtime for babysitting reasons. Nevertheless, the fact that Kops and Perez were aware that Urena had a babysitting problem does not mean that they were obligated to allow her to leave early whenever she required, particularly as it does not appear that Urena on August 17, gave early notice that she had a babysitting problem that day.

The record indicates that while other employees have received warnings for not working overtime, there have been no employees other than Urena who have been discharged for this reason. On the other hand, the Company provided evidence showing that no other employee worked as few overtime hours as Urena. Moreover, the fact remains that prior to the suspension and discharge, alleged to be unlawful, Urena had received two recent warnings about this conduct and was specifically notified that repetition on her part would result in suspension or discharge.

Although I believe that the General Counsel has established a prima facie case of discriminatory intent, I also conclude that the Respondent has successfully met its burden of showing that it would have discharged Urena notwithstanding her union or protected activity.

5. The suspension of Grecia Santana

The complaint alleges that the Respondent illegally suspended Grecia Santana on August 30, 1989. The Company contends that the suspension was warranted because she refused to work overtime on August 29.

Santana's employment with the Company started in November 1985 and she worked in the packing department. Her immediate supervisor was Alfredo Perez.

Santana testified that she learned of the Union from Bolivar Bianchi and that she signed a union card on June 7, 1989. She states that she also spoke in favor of the Union with other employees. Santana unlike some of the other union activists, was invited to and did attend the Company's meetings held in July.

On August 21, 1989, Santana received a written warning from Perez for refusing to stay beyond 6 p.m. to finish the overtime work assigned to her on August 17.

On August 29, Santana received a 2-day suspension because she left without doing her assigned overtime on that day.

There is no dispute that Santana refused to work overtime on the days in question. Although she contends that she told her supervisors that she had babysitting problems, it was not shown that such notification was given with sufficient advance notice. As the Company clearly is entitled to require employees to work overtime (a policy well known to employees), and as the General Counsel has not demonstrated to my satisfaction that there was any discriminatory intent in the Respondent's actions toward Santana, I shall recommend that this allegation of the complaint be dismissed.

6. The warning issued to Bolivar Bianchi

Bolivar Bianchi clearly was the most active union supporter amongst the employees. This was known to the Employer and he was among the several employees who was excluded from the Company's election campaign meetings held with its employees in July 1989.

In August 1989, Bianchi was in the lunchroom talking with two other employees about the Union. Apparently in a fit of frustration, he crumpled a company leaflet, threw it in the garbage and stated to no one in particular that he would like to kill two supervisors. This statement was not addressed to any persons and no names were mentioned. Unfortunately, Supervisor Jorge Grenada happened to enter the lunchroom at that moment and relayed the statement to Mike Sementilli, the director of maintenance.

On August 24, 1989 (shortly after the Union had won the election), Sementilli gave the following ''verbal'' warning to Bianchi.

> We have heard from several people that you have made statements of violence toward supervisors.
>
> Any other statements or threats of violence toward supervisors or coworkers that you make will result in your being terminated.

In my opinion, Bianchi did not intend to threaten anyone and used, for better or worse, what has become (at least in this area), a common expression these days to register dissatisfaction with someone else. I also do not believe that this statement was understood by the Respondent's management to be intended as a real threat.

As the evidence establishes that the Respondent was well aware of the leading role of Bianchi in favor of the Union and, as I conclude, that his statement was neither intended nor understood as a real threat, it is my opinion that the discharge warning was motivated by Bianchi's union activities. In this respect, therefore, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By suspending Matilde Morales for 3 days on August 22 and by discharging her on August 30, 1989, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

[10] In the present hearing, Urena could not recall if she went home on August 17 with Grecia Santana. However, at her unemployment hearing, Urena conceded that she rode with Santana in the latter's car on that date. The inference suggested by Respondent's counsel was that Urena did not refuse to work overtime because of any babysitting problem but because she didn't want to miss her ride with Santana who also left early.

2. By issuing a warning to Bolivar Bianchi and threatening to discharge him, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Also, as I have concluded that the Respondent has, for discriminatory reasons issued a warning to Bolivar Bianchi, it must expunge that warning and give notice to him that this has been done and that such warning will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, The Well-Bred Loaf, Inc., Congers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warnings to, suspending, or discharging employees because of their activities or support for Bakery, Confectionery & Tobacco Workers International Union, Local 3, AFL–CIO or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Matilde Morales immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(b) Remove from its files, any reference to the unlawful warning given to Bolivar Bianchi on August 24, 1989, and the unlawful suspension and discharge of Matilde Morales and notify them in writing that it has done so and that it will not use such disciplinary actions against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Congers, New York, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue warnings to, suspend, or discharge employees because of their activities or support for Bakery, Confectionery & Tobacco workers International Union, Local 3, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Matilde Morales immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to the unlawful warning given to Bolivar Bianchi on August 24, 1989, and the unlawful suspension and discharge of Matilde Morales and notify them in writing that we have done so and that we will not use such disciplinary actions against them in any way.

THE WELL-BRED LOAF, INC.